No. 12331

In the United States Court of Appeals for the Ninth Circuit

CHARLES I. ROSIN, APPELLANT

v.

J. P. HART, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF INTERNATIONAL MINING & MILLING CO., DEBTOR, AND SECURITIES AND EXCHANGE COMMISSION, APPELLEES

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION, APPELLEE

ROGER S. FOSTER,
General Counsel,

AARON LEVY,
HARVEY M. SPEAR,
Attorneys,

Securities and Exchange Commission, 425 Second Street NW, Washington 25, D. C.

W. STEVENS TUCKER,
Attorney,

Securities and Exchange Commission, 630 Sansome Street, San Francisco 11, California.

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INTRODUCTORY STATEMENT

This is an appeal from an order of the United States District Court for the District of Nevada, dated June 28, 1949. The appeal is related to that aspect of the order which denied appellant, Charles I. Rosin, additional compensation for services rendered by him to state court trustees of the debtors.[1] The petition for leave to appeal was filed in this Court on June 25, 1949, and was allowed by order dated August 15, 1949 (Rosin Appx. 93–94).

[1] The District Court's Findings of Fact, Conclusions of Law, and Order are printed at pp. 36–90 of Appellant's Appendix to his brief, hereinafter referred to as "Rosin Appx." Additional documentary material is submitted as an appendix to this brief and will be referred to as "SEC Appx."

The Securities and Exchange Commission was a statutory party to the proceedings below pursuant to Section 208 of Chapter X of the Bankruptcy Act (11 U. S. C. § 608) and is an appellee on this appeal.

COUNTERSTATEMENT OF FACTS

Mount Gaines Mining Company, a Nevada corporation, has been engaged in operating the so-called Mount Gaines mine located in Mariposa County, California. It is a wholly owned subsidiary of International Mining & Milling Company. Both parent and subsidiary have been in reorganization under Chapter X of the Bankruptcy Act since June 29, 1939, on which date separate petitions for reorganization of the two companies were filed and approved. Both proceedings have been treated by the court and the parties in effect as a single consolidated proceeding and the properties of both debtors have been in possession of James P. Hart, the Chapter X trustee appointed on August 11, 1939 (Rosin Appx. 39, 40).

The principal asset of Mount Gaines Mining Company has been the leasehold interest in the Mount Gaines mine and this mining property has been substantially the only source of income of both debtor corporations (Rosin Appx. 40). The lease was originally executed for a term of ten years subject to renewal for another term upon the same conditions, rights and covenants, including an option by the lessee to purchase three-fourths interest in the mine while the lease was in effect. This lease, which was renewed by the Chapter X trustee in 1943, has been the

subject of considerable dispute and litigation, some aspects of which were reviewed by this Court.[2]

The principal promoter of both debtor companies was A. G. Ilseng. Sometime between 1932 and 1937, when Ilseng, members of his family and others associated with him were in control, a substantial amount of International Mining and Milling Company's capital stock was sold to the public. In September of the latter year, A. G. Ilseng and A. G. Ilseng, Jr., were indicted under the mail-fraud statute for fraudulent sale of this stock and their subsequent conviction was upheld on appeal to this Court.[3]

In the months of November and December 1937, a rival faction, headed by C. F. Humphrey, a San Francisco attorney, organized a stockholders' committee. This committee succeeded in ousting the Ilseng faction and assumed control by electing new boards of directors for each of the companies. These directors employed C. F. Humphrey and others as counsel for the debtors and subsequently authorized the filing of the petitions in these Chapter X proceedings (Rosin Appx. 42, 56).[4]

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[2] See *Title Insurance and Guaranty Co.* v. *Hart*, 160 F. 2d 961 (C. A. 9, 1947), cert. denied, 332 U. S. 761 (1947); *Hart* v. *California Pacific Title and Trust Co.*, 136 F. 2d 430 (C. A. 9, 1943). Legal title to the mining property covered by the lease is held in trust for certain individuals as beneficial owners (Rosin Appx. 40.) See also *Hart* v. *California Pacific Title and Trust Co.*, 136 F. 2d 430–431 (C. A. 9, 1943). The Humphrey family is the principal beneficial owner of the fee title (Rosin Appx. 56).

[3] See *Ilseng* v. *United States*, 120 F. 2d 823 (C. A. 9, 1941).

[4] Humphrey's claim for compensation was reviewed by this Court in *Humphrey* v. *Hart*, 157 F. 2d 844 (1946).

The rivalry between the Ilseng and the Humphrey groups touched off a series of disputes and lawsuits and, when the Chapter X petitions were filed in June 1939, there were 12 lawsuits pending between these rival factions, involving charges and countercharges of fraud, mismanagement and illegality of various transactions (Rosin Appx. 42, 56). One of the principal controversies centered about the stockholders' suit brought by the Humphrey group, shortly before its assumption of control, through A. N. Logie and C. F. Humphrey, stockholders, against the Ilsengs and others. This suit, filed in the Mariposa County Superior Court of California, No. 1646 (hereinafter referred to as "Action 1646"), charged mismanagement, misapplication of funds and other wrongful actions by the defendants and, *inter alia,* sought an accounting and the appointment of a receiver.[5] Subsequently, the parties entered into a stipulation dated May 9, 1938, for the appointment of three trustees to take possession of the properties of the two corporations subject to the jurisdiction and orders of the state court. The pertinent terms and conditions under which the trustees were appointed will be discussed hereafter. Pursuant to this stipulation, the California court by order of the same date, appointed as trustees C. B. Buxton, Ilseng's nominee and one of the defendants in that action, H. K. Trask, Humphrey's nominee, and A. V. Udell, the mine super-

[5] The complaint, supplemental complaint, answer and cross-complaint in Action 1646 is Ex. D–2 in the hearing before the referee on the claim of C. F. Humphrey and is included in Record Volume III.

intendent, as the neutral trustee. Trask resigned in February, 1939, and was replaced by A. N. Logie, one of the plaintiffs in Action 1646, as representative of the Humphrey faction. The property and affairs of the corporations were managed under the supervision of these state court trustees for the thirteen-months period prior to the institution of the Chapter X proceedings (Rosin Appx. 26–32, 48). It is for services allegedly rendered to these trustees that appellant herein claims compensation.

Although a plan of reorganization was confirmed on January 17, 1949, it has not been consummated. As a result of continuous operating losses it became apparent that profitable operation of the mine was highly doubtful, and on June 6, 1949, mining operations were discontinued (Rosin Appx. 41, 43). On October 17, 1949, pursuant to notice and hearing, the District Court, concluding that a reorganization was no longer feasible, entered an order of adjudication and directed liquidation in bankruptcy of both companies.

While the outstanding amount of claims against the debtors was reduced in Chapter X proceedings by settlement, litigation or rejection, the reorganization proceedings have been far too long and expensive in relation to the value of the assets and the results achieved. In very large measure, as the court noted, this is attributable to the many factional controversies and the uncompromising attitude of the parties (Rosin Appx. 43–44). As of March 31, 1949, the trustee had paid out $114,826 chargeable as Chap-

ter X expenses. In April 1949 hearings were commenced on sixteen applications for fees and reimbursement for expenses. The total requests, aggregating approximately $140,000, exclusive of interim allowances previously received, exceeded the total cash and liquid assets as of June 15, 1948 (Rosin Appx. 41). On consideration of the evidence the District Court, by order dated June 28, 1949, allowed to six applicants fees and expenses in the aggregate amount of about $33,000 and denied the applications of the other ten, including that of appellant herein (Rosin Appx. 44, 87–90).

In his application filed in the court below, appellant requested an allowance of $10,000 as compensation for services assertedly rendered by him as attorney for the state court trustee, less $500 paid him in the prior proceeding, and for a further allowance of $1,000 for services allegedly rendered in the same capacity in the Chapter X proceeding (Rosin Appx. 2–25). The District Court found that the amount of $500 received by appellant in the prior proceeding was fair and adequate and that, for reasons discussed in detail below, he was not entitled to any additional compensation (Rosin Appx. 47–51). His application was accordingly denied (Rosin Appx. 87, 89), and it is that part of the order which is the subject of this appeal (Rosin Appx. 95–96).

THE ISSUES

The principal issues on this appeal are: (1) whether the District Court applied proper standards of compensability in denying appellant's application for ad-

ditional fees; (2) whether, on the evidence in the record, the District Court abused its discretion by denying appellant's claim for additional compensation.

It is our view that the District Court's determination is in all respects correct and that appellant has failed to show any ground for reversal.

ARGUMENT

Appellant makes two principal contentions on this appeal. First, he urges that as to him the court below did not apply the proper standard of compensability and that as attorney for the state trustees his compensation should be measured not in terms of benefit to the estate but should be determined on the basis of "his effort and diligence in the performance of his duties" (Rosin Brief p. 17). Second, he contends that the court's findings are contrary to the evidence (Rosin Brief pp. 10–16).

We believe that appellant misinterprets the applicable statutory standards and the court's findings with reference to his claim for fees. Section 258 (11 U. S. C. § 658) provides in part that "the judge shall make such provision as may be equitable * * * for the payment of the reasonable costs and expenses incurred therein [in a prior proceeding] as may be allowed by the judge." We do not suggest, and the court below did not hold, that in order to be compensated under Section 258 a receiver, a nonbankruptcy trustee, or his attorney must secure a favorable judgment in the prosecution or defense of claims asserted by or against the estate. We are merely urging that in granting a reasonable allowance for compensation as a cost of the

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prior proceeding, to be paid on a parity with other administrative costs and ahead of creditors, the reorganization judge must be satisfied that the services rendered therein were essential and effective for the proper and constructive administration of the insolvent estate, for whose interest the receiver, the nonbankruptcy trustee and his attorney are required to serve. If their efforts and diligence were not beneficial in this sense they are entitled to no compensation.

Insofar as appellant claims compensation for mere "effort and diligence," without reference to the tangible and demonstrable results achieved, such standard is hardly in accord with the declared policy of the Congress to keep the cost of bankruptcy reorganization within economic limits,[6] and allowances based thereon are neither "equitable" nor "reasonable" within Section 258. Indeed, under Section 258 fee allowances for services rendered in the prior proceeding are to be determined exclusively by the Chapter X court and not by the state court, even though the latter court had supervised the prior administration of the estate and as a rule would be better acquainted with the character of the fee claimant's services. By denying to the state court the power to determine such allowances even initially,[7] Section

[6] See *Callaghan* v. *Reconstruction Finance Corporation*, 297 U. S. 464, 469 (1936); *Brown* v. *Gerdes*, 321 U. S. 178, 181 (1944). See also *Teasdale* v. *Sefton Nat. Fibre Can Co.*, 85 F. 2d 379, 382 (C. A. 8, 1936), where the court stated that in the interest of economy it was "not every service that may in some remote degree contribute to the general welfare of the proceeding that the court is bound to compensate . . ."

[7] *Brown* v. *Gerdes*, 321 U. S. 178, 182, 183–184 (1944); *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005–1006 (C. A. 3,

258 emphasizes all the more that appellant's compensation must be measured by the contribution of his services to the over-all administration of the estate and not on the basis of time and effort as such. This is the very standard that has been held applicable under Section 241 of the Act which relates to compensation for the Chapter X trustee, his counsel, the attorney for the debtor, and others, despite the absence of any specific statutory requirement that their services be "beneficial." [8]

Like any other fee claimant in the Chapter X proceeding for services rendered to the estate, appellant had "the burden of proving their worth," [9] and it was

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1941). In *Butzel* v. *Webster Apartments Co.*, 112 F. 2d 362 (C. A. 6, 1940), it was held that even where the state court had fixed the amount of compensation to be allowed for services in the prior proceeding that amount might be reduced in the supervening bankruptcy reorganization in the light of the standards applicable in the latter proceeding.

[8] *In re Porto Rican American Tobacco Co.*, 117 F. 2d 599 (C. A. 2, 1941). See also *Oklahoma Ry. Co.* v. *Johnston*, 155 F. 2d 500 (C. A. 10, 1946); *In re Condor Pictures, Inc.*, 33 F. Supp. 174 (S. D. Cal. 1939), affirmed, 112 F. 2d 575 (C. A. 9, 1940).

The same standard has long been recognized in straight bankruptcy with respect to claims for professional services rendered to a superseded assignee for the benefit of creditors. *Randolph* v. *Scruggs*, 190 U. S. 533, 539 (1903). Similarly, this standard has been applied to allowances to a receiver and his attorney where the receivership is superseded by bankruptcy. *Hume* v. *Myers*, 242 Fed. 827 (C. A. 4, 1917); *State of Missouri* v. *Angle*, 236 Fed. 644 (C. A. 8, 1916); *In re Standard Fuller's Earth Co.*, 186 Fed. 578 (D. C. Ala. 1911); see also *Goldie* v. *Cox*, 130 F. 2d 690, 698 (C. A. 8, 1942).

[9] *Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262, 268 (1941); *Union Guardian Trust Co.* v. *Manor Realty Co.*, 122 F. 2d 551 (C. A. 6, 1941); *Gochenour* v. *Cleveland Terminals Bldg. Co.*, 142 F. 2d 991, 995 (C. A. 6, 1944).

incumbent upon him to present the relevant facts on the basis of which the nature and extent of his services might be ascertained, their contribution or benefit to the administration of the estate might be appraised, and his compensation, if any, might be determined. In this case, as the court below found, the evidence does not support his claim for compensation in addition to the amounts previously paid him (Rosin Appx. 50). This is clearly shown upon examination of his claim in the light of the evidence.

1. Appellant's alleged employment prior to September 2, 1938

In his petition appellant states that a few weeks after the appointment of the state court trustees on May 9, 1938, Buxton and Trask, two of the trustees, met at his office and "at said time petitioner was employed and appointed by the Trustees as attorney for Trustees * * *" (Rosin Appx. 6, Rosin Brief 32). The court found that his employment as attorney for the state court trustees was first authorized by order of September 2, 1938, and that the evidence does not show his employment prior to that date (Rosin Appx. 48, 49). The record fully supports the findings of the court below.

The stipulation and order of May 9, 1938, appointing the state court trustees, contemplated that the affairs of the debtor corporations be conducted with the strictest economy for the purpose of paying off creditors. To that end it was provided, *inter alia,* that the proceeds from the operations of the mine be devoted first to the payment of operating expenses and royalties; that no salaries be paid to any officer or

director of the corporations, except to the trustees and operating and office personnel at the mine; that all pending litigation in which either of the corporations was a party be suspended and that no new litigation be undertaken except upon order of the court; and that no liability or indebtedness be incurred on behalf of the corporations except for operating purposes and the payment of salaries as noted above (Rosin Appx. 26–31). The stipulation and order made no provision for the employment of counsel and such employment and accrual of charges for legal services without explicit authority of the state court would have been clearly contrary to the terms under which the trusteeship was established. It was not until September 1938, on the basis of an affidavit showing the necessity for engaging counsel, that Judge Trabucco of the California Superior Court issued in Action 1646 the order of September 2, 1938, appointing appellant herein attorney for the trustees (SEC Appx. 1).

There is nothing in the record to support the claimed appointment of appellant as attorney for the state trustees prior to September 2, 1938. In fact, the exchange of letters between appellant and trustee Udell during the first week of September 1938 appears to show that a request for appellant's appointment as attorney for the trustees was first made on or about September 1, 1938.[10] Nor is appellant's contention

[10] In his letter to Udell dated September 2, 1938, appellant outlined the legal proceedings he intended to undertake in Action 1646, and enclosed Buxton's affidavit requesting an order to employ him as attorney, stating that "Mr. Buxton and Mr. Trask under-

supported by trustee Buxton, who testified as appellant's witness. The sum and substance of Buxton's testimony was that the trustees had employed no one except appellant as attorney, that they met "quite often" with appellant, that Buxton "kept in close touch" with appellant and that appellant represented the trustees "at all times that was demanded" (Transcript 74–75, SEC Appx. 15–16). Buxton's testimony does not even remotely suggest employment of appellant as attorney for the trustees during the months of May through August 1938 or that such employment was even discussed in May 1938.

Appellant's claimed appointment in May 1938 is not even supported by his own testimony as to what allegedly occurred in May 1938. In his direct testimony appellant merely stated that Buxton and Trask met with appellant in the latter's office; that they advised him of having written to Judge Trabucco about employing an attorney; that they talked to appellant about representing them and that this was agreeable to appellant. As previously noted, none of this was corroborated by Buxton, appellant's own witness. Appellant further testified that he had written to Judge Trabucco advising him about his discussion with the trustees and that he inquired "about what arrangement there would be on fees" (Transcript 5). This letter, which appears to have been written on May 21, 1938, was not produced, and Judge Trabucco

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stand that it is agreeable with you, and I hope that it is." In his reply dated September 6, 1938, Udell approved appellant's appointment as attorney and the actions contemplated by appellant (SEC Appx. 16–19).

in his reply dated May 25, 1938, makes no mention of appellant's purported employment and, indeed, appellant himself testified that this letter "is not in itself an appointment," and that no order for his appointment was entered at that time (Transcript 5). Judge Trabucco's letter merely refers generally to "attorneys' fees," pointing out that it was inadvisable to make any orders with respect thereto because of the lack of funds but stating that when funds should be available he would allow "attorneys' fees on account" (Rosin Appx. 33). This would appear to refer to allowances for the attorneys, including appellant, who appeared in Action 1646 prior to the appointment of the state court trustees. Appellant makes no claim for compensation for any services he may have rendered prior to the time the trusteeship was established (Rosin Appx. 4; Transcript 68–69).

2. Appellant's claim for compensation for services in state court proceedings subsequent to his appointment on September 2, 1938

This category includes primarily services performed by appellant during the 10-month period prior to the institution of the Chapter X proceeding; and in addition alleged services related to Action 1646 in the state court, which appellant performed when the Chapter X proceeding was already pending. The order appointing appellant as attorney for the state court trustees authorized appellant to commence certain "proceedings intended to be filed by him" in Action 1646 and authorized an advance to him of $100 to defray incidental expenses, his compensation to be deter-

mined thereafter by the court (SEC Appx. 1). Pursuant thereto, appellant instituted what were in effect two ancillary proceedings in Action 1646, one to enjoin the Humphreys and the directors of the corporations, then controlled by the Humphreys, from negotiating the cancellation or revision of the lease under which Mount Gaines was operating the mining property, and the other to prevent the officers and directors from incurring any obligations on behalf of the corporations (Rosin Appx. 48–49). To a very large degree, these proceedings served to implement the stipulation and order of May 9, 1938, which provided that the state court trustees assume management and operation of the debtors' properties, and that the proceeds from the operation of the mines be transmitted to the trustees to be used for purposes previously described. The stipulation and order also enjoined the payment of salaries to officers and directors, the holding of stockholders' meetings and restrained all persons from interfering with the possession and control of all property in possession or under the control of the trustees (Rosin Appx. 26–27, 28, 29, 31).

On October 3, 1938, the state court in Action 1646 issued an order granting the aforesaid relief (Rosin Appx. 34–35). The same order awarded appellant an interim allowance of $300.[11] Under a later order appellant was granted an additional allowance of $200

[11] By the same order the court also directed that the accounting and report of the trustees, as presented and as approved by the court, be filed (Rosin Appx. 35). According to the testimony of trustee Udell this refers to reports by the trustees to creditors and stockholders (SEC Appx. 12–13).

on account, making a total of interim allowances to him of $500 (Rosin Appx. 48–49), in addition to the $100 allowed and paid to him for incidental expenses (SEC Appx. 1).

As previously noted, appellant requested in the court below an over-all fee of $10,000 for services rendered to the state trustees in the nonbankruptcy proceedings, less the $500 previously allowed him. The court found that appellant had received adequate compensation for his services in the nonbankruptcy proceedings, while as to the other alleged services in the state court proceedings the evidence failed to show that they were of direct and demonstrable benefit to the estate (Rosin Appx. 49–50). It is submitted that the findings of the court below are in accord with the evidence. On analysis, the record shows that in general appellant misstated or exaggerated the extent or importance of his services, in some instances claiming sole credit for results accomplished largely or wholly by the efforts of others. The record is also replete with general allegations of time and effort devoted, but without the requisite factual support on the basis of which the character of his services could even be ascertained, much less appraised and evaluated.

For example, appellant alleges that pursuant to authority of the Court in Action 1646 he prepared and filed a suit for an accounting against Humphrey, that the action was withdrawn on the advice of the Court, that a stockholder action for an accounting was subsequently brought on the basis of appellant's data,

and that compensation has been awarded to the attorneys in that suit, "though no recovery was made" (Rosin Brief p. 13; Rosin Appx. 15–16).

This is an incorrect and incomplete statement of the matter and in any event it is clear that appellant can claim no additional compensation for any alleged services in that lawsuit. The record shows that on September 2, 1938, when he was appointed attorney for the trustees, appellant prepared an application for leave to file an action against the Humphreys for an accounting (SEC Appx. 16–17). The basis of the proposed action appears to have been the alleged illegality of the election of the Humphrey board at the end of 1937, and the accounting was for salaries, attorneys' fees and other disbursements which these directors had made on behalf of the corporation from the time of their assumption of office (SEC Appx. 18). Appellant testified that authority to file the suit was initially granted by the state court, but by letter dated October 7, 1938, Judge Trabucco withdrew his authorization because it was not advisable to incur any additional litigation expenses, and the action accordingly was not filed (Transcript 46–47).[12] Thereupon, according to his testimony, appellant persuaded the trustees to permit him to go ahead with the proposed action upon the understanding that he "wouldn't ask for any fees" except a "reasonable charge" for

[12] The court also refused to grant the trustee's request to institute an action for a declaratory judgment regarding an interpretation of the lease (Rosin Appx. 35). Some aspects of the controversies regarding the terms of the lease under which the mine was operated reached this Court. See cases cited, note 2, *supra*.

amounts recovered (Transcript 47). Appellant filed the action but shortly thereafter withdrew it at the insistence of one of the trustees (Transcript 48).[13]

Appellant also contends that in measuring the extent and value of his services account should be taken of the allegedly successful administration of the state court trusteeship. In support thereof, he alleges that when the Chapter X petition was filed in June 1939 the assets of the debtor, as shown by the Chapter X petition, were in excess of $100,000 and that "liabilities were then approximately half that amount" (Rosin Brief p. 28); and that but for the intervention of the Chapter X proceeding "the trustees were prepared within a brief time to report to the Court that the corporations were in good standing and that their duties had been fulfilled" (Rosin Appx. 17–18). Wholly apart from the question of appellant's contribution to the alleged success of the state court trusteeship, the facts shown by the record are to the contrary. The Chapter X petition for reorganization, which was approved by the court, expressly alleged that the debtor was unable to meet its debts as they matured, that it was faced with a

[13] Subsequently, a minority stockholders' suit was brought against the Humphrey board for an accounting. That action was ultimately dismissed as part consideration for the settlement of the claims of the Humphreys against the debtors (Rosin Appx. 69). The Chapter X trustee was represented in that action by special counsel appointed by order of the Chapter X court, for which services counsel has been allowed compensation (Rosin Appx. 68–69). Appellant's contention that the data prepared by him were used by the Chapter X trustee was not substantiated and, indeed, the documents in question, on the basis of which their significance might be appraised, were not produced by appellant.

host of claims and possible attachments and that reorganization was necessary in order to effect payment of all such claims and to assure continued operation of the mine by the debtor. Moreover, as expressly found by the court below (Rosin Appx. 43), when the state court trusteeship was superseded by the Chapter X proceedings, there were filed 54 creditors' claims in the aggregate amount of about $203,000. It was in the course of the Chapter X proceedings that these claims were reduced by approximately $113,000 as a result of litigation, settlement or rejection by the Chapter X trustee.

Appellant also alleges that he saved the estate about $2,000 by effecting a settlement at a discount of a number of undisputed claims (Rosin Appx. 16–17). This is not in accord with the facts. According to the testimony of A. G. Ilseng, appellant's own witness, it appears that the settlement of these claims was negotiated personally by Ilseng, who had been in control of the debtor corporations when the liability on these claims was incurred, and that Ilseng agreed to undertake the settlement negotiations without charge except for actual expenses (SEC Appx. 11–12). Judicial approval for the settlement of these claims, which were undisputed, was presumably a routine matter and, indeed, Ilseng himself secured the judge's signature to the order authorizing their payment (SEC Appx. 4–5). The extent of appellant's contribution to these matters appears to have been incidental and nominal.[14]

[14] Appellant sought to introduce an alleged copy of a petition to the state court for authority to pay off past obligations. This

Appellant also bases his request for additional compensation on his opposition to the suits against the debtors by Edwards and Riemer in June 1939 (Rosin Brief, pp. 13–14). The substance of his opposition was that no process had been served on the state court trustees and that these suits were collusive (Rosin Brief, p. 8). From his fee application and his testimony, it appears, however, that he was unacquainted with the nature of these actions. He appeared in court requesting postponement of the trial, but the court denied the request, stating that on the record the parties appeared to be properly represented. Judgment was thereafter entered in favor of the claimants (Rosin Appx. 12–13; Transcript 35–37).[15] In the Chapter X proceedings, which followed shortly, these claims were contested by the Chapter X trustee, and eventually the Riemer claim was allowed in full and the Edwards claim (assigned to Peel) was compromised.[16]

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copy was received in evidence only for the limited purpose of showing the list of claims attached to that petition (Transcript 26–27).

Appellant also claims credit for settling a $1,360 judgment, plus interest (Atlas Powder claim) for $1,000 (Rosin Appx. 16–17). From his testimony, however, it would appear that the extent of his services is not readily ascertainable (Transcript 24–26).

There appears also some alleged claim for services in connection with a claim of one Knowles (Rosin Brief p. 11). This claim was not specifically mentioned in appellant's fee application and his testimony regarding it is meagre and vague (Transcript 27).

[15] In his application appellant states he had consulted one of the trustees before appearing in those actions (Rosin Appx. 12), while in his testimony he could not recall having consulted any of the trustees (Transcript 35).

[16] The pleadings and orders on these claims are included in Record Volume III.

Appellant also claims compensation for alleged services in the suit brought by one Gustaveson against the Mount Gaines Mining Company for a declaratory judgment allegedly affecting the property and lease of the mine. In his application appellant states that after consultation with the trustees he prepared an answer and cross-complaint to that action, "mailed a copy thereof to plaintiff's attorneys, and then proceeded to file same with the clerk of the Court, upon which petitioner was informed that the plaintiff had dismissed the said action" (Rosin Appx. 15). Although the stipulation and order of May 9, 1938, appointing the trustees, had enjoined the undertaking of any new litigation except upon written approval of the court (Rosin Appx. 30) and the court had specifically refused to authorize the bringing of a declaratory action for interpreting the lease (Rosin Appx. 35), appellant procured no court authorization to intercede in the Gustaveson suit in which the trustees were not named as parties. According to his testimony, appellant prepared the pleadings in January 1939 on instruction of trustees Buxton and Trask. Trask, however, refused to sign the papers, having resigned in the meantime, and appellant did not secure any authorization from Trask's successor or the third trustee. Finally, when in March appellant forwarded the papers to a local attorney for filing, he was advised by the latter that the action had been voluntarily dismissed and the pleadings were not filed (Transcript 16–20). From his testimony it is clear that there was no causal connection between appellant's efforts

and the dismissal of the action, although his fee application, as quoted above, seemingly suggests that there was.

Appellant also refers to his success during January and March of 1939 in opposing the motion of Humphrey to discharge the state court trustees (Rosin Appx. 10–11). He omitted to disclose, as he later testified on cross-examination, that two other attorneys representing various parties in Action 1646, vigorously opposed the Humphrey motions (Transcript 32–34; SEC Appx. 4). He also testified that this matter was taken up to the Supreme Court of California on a writ of prohibition but admitted that he did not participate in that phase of the proceeding (Transcript 34). The extent of his contribution vis-a-vis the other attorneys is not clear. He testified that he prepared a two-page affidavit of Buxton and a one-page document in "opposition to motion" (Transcript 28), but he did not introduce them in evidence.

Appellant also cites his successful opposition to Ilseng's motion to dismiss Action 1646 in June 1947. He alleges that he filed a petition against the motion and states that as a result of his efforts the motion was denied (Rosin Appx. 14–15). It should be noted, however, that this motion was filed 8 years after the state court trusteeship had been superseded by the Chapter X proceeding. Action 1646, it will be recalled, was a minority stockholders' suit for the benefit of International to obtain an accounting from Ilseng and others and a determination of the validity of the issuance to Ilseng of class A stock of International

(Rosin Appx. 46–47). This asserted cause of action passed to the Chapter X trustee [17] and, since the issues there involved were also raised in connection with Ilseng's claims against the estate in the Chapter X proceeding,[18] the reorganization trustee obtained authority to appoint F. E. Braucht, special counsel, to oppose the motion to dismiss. As a result of his efforts, as the court below found, no action was taken by the state court on the motion to dismiss and Braucht was allowed $200 compensation for his beneficial services (Rosin Appx. 46–47). As the trusteeship had long been superseded by the Chapter X reorganization, appellant had no interest in the stockholders' suit against the Ilsengs. He received no authority from the Chapter X court to intercede—nor, for that matter, from the state court trustees (Transcript 38–39). Appellant was a mere volunteer,[19] and the estate may not be taxed for his alleged services, especially where the required services were properly and effectively performed by counsel specially appointed by the Chapter X court for that purpose.

Finally, throughout his petition and testimony, there appear vague and general references to "a number of court appearances" in Action 1646, in addition to those discussed above, occupation "almost daily"

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[17] *Meyer* v. *Fleming*, 327 U. S. 161, 167–168 (1946).

[18] The claims of Ilseng and the cross-claims were compromised in the Chapter X proceeding through the efforts of special counsel employed by the Chapter X trustee pursuant to court authority (Rosin Appx. 85–86).

[19] See *In re Porto Rican American Tobacco Co.*, 117 F. 2d 599 (C. A. 2, 1941); *In re Progress Lektro Shave Corp.*, 117 F. 2d 602 (C. A. 2, 1941).

with some undescribed "business of the Trusteeship," and use of appellant's office for carrying on "the business of the Trustees (Rosin Appx. 18; Rosin Brief p. 5; SEC Appx. 13–15). Insofar as any of the foregoing are not related to the particular alleged services which he describes elsewhere in his petition and which we have discussed previously, there is nothing in the record from which the nature and extent of these alleged efforts might be ascertained and their contribution to the estate determined. Nor has appellant provided any reason for his alleged preoccupation with the daily routine business of the trustees, even if it is assumed that such were the case, inasmuch as each of the trustees was paid $150 per month plus necessary expenses for these services.[20] Since the "business of the Trusteeship" consisted of general supervision over mining operations conducted by a manager and office personnel at the mine, vague and indefinite allegations about "almost daily" preoccupation with such business can scarcely warrant compensation for services of appellant as attorney.

3. Appellant's claim for compensation for alleged services in the Chapter X proceeding

Appellant also claims compensation in the amount of $1,000 for services allegedly rendered in the Chapter X proceedings. Purportedly acting on behalf of the state court trustees appellant appeared in opposition to the Chapter X proceeding and subsequently

[20] Appellant admits that during their thirteen months in office the three trustees received $5,850 in fees plus expenses (Rosin Appx. 18).

in connection with the filing of reports for the state court trustees. These are the only services upon which appellant bases his claim for $1,000. The court below found that these services did not confer "any direct, substantial and demonstrable benefit upon the estates in reorganization" (Rosin Appx. 51).

The answers filed by appellant were intended to oust the Chapter X court from its jurisdiction and reflected only the views of a dissentient state court trustee.[21] His efforts, of course, were not successful. As for appellant's services in connection with the accounting by the state court trustees, it appears that such a report had been prepared by certified public accountants and signed and filed in the state court by two of the three trustees (SEC Appx. 12–13). There is nothing in the record to show the need or usefulness of the minority

[21] The court below found that in the matters in which appellant sought to appear in the Chapter X proceeding he indicated authorization only by one of the three state court trustees and that the evidence showed no authority to represent the state court trusteeship (Rosin Appx. 51). Appellant relies on a presumption that an attorney who appears on behalf of a client has been properly authorized (Rosin Brief pp. 22–23). Whatever the effect of the cases cited by appellant, they do not relate to a situation where the attorney appears as a fee claimant and hence are not relevant. In any event, as pointed out in the text with respect to the accounting, appellant clearly did not represent a majority of the state court trustees. Similarly, it appears that the answers purportedly filed on behalf of the state court trustees were actually on behalf only of the one trustee since the names of the others had been crossed out. Appellant admitted they did not sign the answers, and thereafter, when appellant had filed a notice of appearance on behalf of the trustees, the Chapter X trustee moved to vacate his appearance. Although appellant stated that this motion had been denied (Rosin Appx. 20), on cross-examination he conceded that the court had not acted upon it (Transcript 56–57).

report on behalf of the third trustee, and the court below specifically refused to recommend that such a report be filed in the state court, although he had no objection to its being filed there (SEC Appx. 7–10). Subsequently, the court below refused to allow appellant permission to file a report in the Chapter X proceeding (SEC Appx. 12–13; Transcript June 19, 1942).

4. The findings of the court below are supported by the evidence

From the foregoing analysis it is clear that the record fails to substantiate appellant's asserted contributions or benefits to the estate on the basis of which he would have the court award him an additional $9,500 in fees for alleged services on behalf of the trusteeship in the state court proceedings and $1,000 for services in the same capacity in the Chapter X proceeding. As we have shown in detail above, appellant's enormous claim is based largely upon an exaggerated view as to the extent and importance of his alleged services and most of his arguments reflect merely disagreement with the court's view as to the weight and sufficiency of the evidence. Such disagreement, however, affords no valid ground for disturbing the court's findings.[22] In the exercise of its statutory responsibility over fee allowances, the court considered the evidence in the record. It concluded that the $500 previously allowed and paid to appellant was fair and reasonable compensation and that he was not entitled to any more. That determination should be sustained on appeal, unless it is

[22] *Silver* v. *Scullin Steel Co.*, 98 F. 2d 503, 505–506 (C. A. 8, 1938).

shown that the court's findings are so clearly erroneous as to amount to an abuse of discretion and a "manifest disregard of right and reason."[23] No such showing has been or can be made in this case.

Furthermore, it should be observed that in bankruptcy reorganizations, consideration must be given not only to time and labor but also to the importance of the issues, the value of the property and ability to pay.[24] It is, therefore, pertinent to note that the debtors were under state court administration for about 10 months following appellant's appointment as attorney for the state court trustees, as against 10 years of Chapter X administration, and that, as disclosed by the petition for reorganization, the prior proceeding was unable to cope with the financial difficulties of the debtors and the substantial amount of claims still outstanding.[25] When the petitions for al-

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[23] *In re Mt. Forest Fur Farms of America*, 157 F. 2d 640, 648 (C. A. 6, 1946); *Stein* v. *Hemker*, 157 F. 2d 740, 743 (C. A. 8, 1946); *London* v. *Snyder*, 163 F. 2d 621, 625 (C. A. 8, 1947); *In re American Mail Lines, Ltd.*, 115 F. 2d 196, 198 (C. A. 9, 1940).

[24] *In re Detroit International Bridge Co.*, 111 F. 2d 235, 237 (C. A. 6, 1940); *Oklahoma Ry. Co.* v. *Johnston*, 155 F. 2d 500, 502–503 (C. A. 10, 1946); *In re Columbia Ribbon Co.*, 117 F. 2d 999, 1002–1003 (C. A. 3, 1941); *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1006 (C. A. 3, 1941).

In the *Keystone* case, *supra*, the court held that allowances for services in a prior proceeding should be made at the end of the Chapter X proceeding, at which time such services could be appraised in the light of the over-all reorganization and the availability of funds for payment to all fee applicants.

[25] The total undisputed claims settled in the prior proceeding—and that, as we have seen, accomplished largely by the efforts of others—amounted to $27,000 (Transcript 24). Total claims outstanding when the Chapter X proceedings were brought were over

lowances were before the court, total administrative costs of the reorganization were about $145,000, an amount which the court deemed "high in relation to the value of the assets and the results accomplished" (Rosin Appx. 44). Mining operations have been suspended because the ore produced was not of sufficient quality to make commercial operation profitable (Rosin Appx. 41), reorganization was found to be not feasible and both corporations are now in bankruptcy liquidation. Of the total fees and expenses requested, amounting to over $140,000, the court allowed only about $33,000, bringing total allowances for all counsel to about $59,000 (Rosin Appx. 44), and, in view of the financial condition of the debtors, there is doubt whether there will be sufficient funds to pay in full these allowances plus the cost of liquidation. In the light of the foregoing and the facts pertaining to appellant's alleged services as previously discussed, it is submitted that the court's finding that $500 was fair and adequate was proper and in accord with the evidence.

$200,000 and were settled and otherwise disposed of subsequently for a little better than half that amount.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted.

ROGER S. FOSTER,
General Counsel,
AARON LEVY,
HARVEY M. SPEAR,
Attorneys,
Securities and Exchange Commission, 425 Second Street NW., Washington 25, D. C.
W. STEVENS TUCKER,
Attorney,
Securities and Exchange Commission, 630 Sansome Street, San Francisco 11, California.

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